No. 6421

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. C. WALTON,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

THOMAS F. McCUE, Esq., 1836 Hunter-Dulin Bldg., San Francisco, Calif.,
Attorney for Plaintiff and Appellant.

A. B. DUNNE, Esq., Insurance Exchange Bldg., San Francisco, Calif.,
Attorney for Defendant and Appellee.

In the Southern Division of the United States District Court, in and for the Northern District of California.

AT LAW—No. 18,791–K.

J. C. WALTON,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

COMPLAINT.

The plaintiff for his first cause of action against the defendant alleges:

I.

That the jurisdiction of this court attaches for the reason that the action is brought against a common carrier by railroad, engaged in interstate

commerce, and it was so engaged at the time and place of the accident described herein; that this action is brought under the Federal Employers' Liability Act; and the defendant's principal place of business and its offices, and officers are located within the jurisdiction of this court; and that plaintiff is a resident of Alameda County, California, and domiciled therein.

II.

That at all times mentioned herein the defendant is and was a railroad corporation, engaged in the business of a common carrier by railroad and interstate commerce and that at the time and place of the accident described herein, both the plaintiff and the defendant were engaged in interstate commerce; that the defendant is a corporation incorporated and existing under the laws of the State of Kentucky and domiciled in said state. [1*]

III.

That on or about the 25th of March, 1930, at about the hour of 4 o'clock in the afternoon of said day at the town of Colton, California, the plaintiff was regularly employed by the defendant in the capacity of a hostler's helper; that his duties as such hostler's helper required him to fill the tanks on engines with fuel oil; and that on said day at said time and place the plaintiff was on the top of a tender or tank attached to defendant's locomotive engine No. 2604, filling said tank with fuel

*Page-number appearing at the foot of page of original certified Transcript of Record.

oil; and that in order for him to fill said tank it was necessary for him to handle the oil beam for the purpose of supplying said fuel oil; and that while the plaintiff was so engaged said locomotive engine backed automatically without being guided or directed by anyone suddenly and with such violence that plaintiff was struck by the oil beam, thrown violently against the back of the cab and was thereby injured as hereinafter set forth.

IV.

That at the time and place of the injury of the plaintiff, said locomotive engine was run out under the oil beam by the defendant's hostler, for the purpose of supplying fuel oil to said engine, that said hostler's duty required him to be in the cab of the engine occupying the place that is usually occupied by an engineer and that instead of remaining in said cab while said engine was being supplied with the fuel oil, said hostler got down out of the cab and left it without anyone taking care of or being in control of the throttle, or air brakes; that by reason of the negligence and carelessness of the defendant's hostler in the handling and operation of said locomotive engine at said time and on account of his failure to be in a position to control and keep said engine standing stationary, said engine automatically, suddenly and violently ran backwards and injured the plaintiff as [2] hereinafter set forth; that at said time said engine was defective in this: that it had a defective, leaky throttle, the valves and air con-

nections controlling the air for the purpose of setting the brakes were also defective and out of repair and that when the steam accumulated in the steam chest the throttle and valves, and other connections and appurtenances were so out of repair and defective that they failed to hold the steam in its place; that by reason of said defective condition of said engine and the failure of the hostler to remain in a position so that he could control the engine, said engine ran away as hereinbefore set forth; that the negligence and carelessness of the defendant, through its agents and employees was the direct and proximate cause of plaintiff's injuries.

V.

That at the time and place of the accident hereinbefore described the plaintiff was supplying said engine with fuel oil preparing the said engine for the purpose of enabling it to handle interstate commerce in interstate commerce traffic; and that said engine was being fueled preparatory to its use in interstate commerce and that said engine was a regularly assigned engine to handle and transport interstate commerce.

VI.

That at the time and place hereinbefore described, and as the direct and proximate result of the negligence of the defendant, its officers, agents and employees, the plaintiff was injured as follows: A fracture of his seventh and eighth dorsal vertebrae; a fracture and broken end of his left third

lumbar; fractured and broken bones of the front part of his cervical spine; an abnormal condition of the atlas, causing fever and excruciating pain; a tearing and severing of the ligaments in the dorsal and cervical region; internal injuries and bruises in the upper portion [3] of his body; a crushed and broken pelvis; that on account of said injuries the plaintiff was confined in the White Memorial Hospital at Los Angeles from March 26, 1930, until the 14th of April, 1930, that on the 15th day of April, he was transferred to the Southern Pacific Hospital in San Francisco, where he was confined until on or about the 6th day of July, 1930, and for a period of eighty-four days he was compelled to lie on his back in bed and unable to move without assistance. During all of said time he suffered physical and mental, excruciating pain; that he is a married man and has a family and at the time of his injuries he was the age of thirty-two years and an able-bodied, healthy man; and that on account of said injuries he has been wholly incapacitated from earning any thing whatever which has caused him great mental suffering and worry on account of his inability to earn a living to support his family; at said time and prior to his injuries he was earning the sum of five dollars and seven cents (5.07) per day, seven days a week; that he is still confined in a hospital and still suffering pain both physical and mental; that his injuries are permanent.

VII.

That by reason of the facts hereinbefore alleged

the plaintiff was compelled to employ physicians and surgeons and he has already become liable for hospital, nurses, medical attention and doctors' bills, in the sum of two thousand ($2,000.00) dollars; and that two thousand ($2,000.00) dollars is the reasonable and usual charges and costs for said services, no part of which has been paid; that by reason of the facts hereinbefore alleged and the injuries sustained, pain and suffering, the plaintiff has been damaged in the sum of seventy-five thousand ($75,000.00) dollars, no part of which has been paid.

The plaintiff for his second and further cause of action against the defendant alleges:

I.

Plaintiff incorporates and re-alleges Paragraphs I, II, III [4] and IV, the same as though the same had been rewritten and set out in full as therein stated.

II.

That on the 25th day of March, 1930, the plaintiff was regularly employed by the defendant as a hostler's helper and was receiving from the defendant the sum of five dollars and seven cents ($5.07) per day, and was so engaged for seven (7) days of the week; that as a part of the duties as said hostler's helper the plaintiff was required to fill the tanks and domes of the locomotive engines of the defendant with fu*le* oil; that on said day at the town of Colton, California, while the plaintiff was on the top of the dome of the tender

the defendant's engine No. 2604 supplying fuel oil to said engine, the defendant's hostler, whose duty was to remain in the cab and in control of said engine, carelessly and negligently left his post of duty leaving the engine unprotected and that said engine suddenly and violently of its own accord and without anyone guiding, ran backwards, threw the plaintiff violently against the back of the cab of said engine where he was injured as hereinafter set forth.

III.

That at the time and place that plaintiff was injured the defendant through its officers, agents and employees, negligently and carelessly and in violation of the Federal Boiler Inspection Act, and directly contrary to the requirements of section 23, U. S. C. A., Volume 45, page 79, U. S. Statutes, failed to properly inspect said engine No. 2604 and used said engine and permitted it ot be used at said time and place while its throttle, valves and steam chest and other appurtenances thereto were defective, in bad condition and unsafe to be operated in the service for which the same was being employed, in violation and contrary to the statute aforesaid; and that by reason of said engine having not been [5] sufficiently inspected and being unfit for the service for which it was being used and as the direct and proximate result thereof plaintiff was injured as hereinafter set forth.

IV.

That by reason of the facts hereinbefore set

forth and as the direct and proximate result of the failure of the defendant to have said engine, boiler and appurtenances thereto inspected and permitted the same to be used in the service of the business, for which it was intended and used, while it was defective, uninspected and out of repair in the parts and appurtenances hereinbefore described, plaintiff was injured as follows: A fracture of his seventh and eighth dorsal vertebrae; a fracture and broken end of his left third lumbar; fractured and broken bones of the front part of his cervical spine; an abnormal condition of the altas, causing fever and excruciating pain; a tearing and severing of the ligaments in the dorsal and cervical region; internal injuries and bruises in the upper portion of his body; a crushed and broken pelvis; that by reason of said injuries plaintiff was compelled to employ physicians and surgeons and he has already become liable for hospital, nurses, medical attention and doctors' bills, in the sum of two thousand ($2,000.00) dollars; and that two thousand ($2,000.00) dollars is the reasonable and usual charges and costs for said services, no part of which has been paid.

V.

That on account of said injuries the plaintiff was confined in the White Memorial Hospital at Los Angeles from March 26, 1930, until April 14th, 1930; that on the 15th day of April, he was transferred to the Southern Pacific Hospital in San Francisco, where he was confined until on or about

the 6th day of July, 1930, and for a period of eighty-four days he was compelled to lie on his [6] back in bed and unable to move without assistance. During all of said time he suffered physical and mental, excruciating pain; that he is a married man and has a family and at the time of his injuries he was the age of thirty-two years and an able-bodied healthy man; and that on account of said injuries he has been wholly incapacitated from earning anything whatever which has caused him great mental suffering and worry on account of his inability to earn a living to support his family; at said time and prior to his injuries he was earning the sum of five dollars and seven cents ($5.07) per day, seven days a week; that he is still confined in a hospital and still suffering pain both physical and mental; that his injuries are permanent.

VI.

That by reason of the aforesaid facts plaintiff has been damaged as follows: On account of loss of time and salary the sum of six hundred and eighteen dollars and twenty-four cents ($618.24); for doctors' bills, nurses, hospitals, medical attendance, the sum of two thousand ($2,000.00) dollars; and for injuries sustained, pain and suffering, the sum of seventy-five thousand ($75,000.00) dollars, making a total of seventy-seven thousand six hundred and eighteen and 24/100 ($77,618.24) dollars, no part of which has been paid.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of seventy-seven

thousand six hundred and eighteen and 24/100 ($77,-618.24) dollars, together with his costs and disbursements herein.

THOMAS F. McCUE,
Attorney for Plaintiff. [7]

State of California,
County of Alameda,—ss.

J. C. Walton, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents there; that the matters and things set forth therein are true of his own knowledge, except as to those matters and things stated upon information and belief and as to those matters and things he believes them to be true.

J. C. WALTON.

Subscribed and sworn to before me this 22d day of July, 1930.

[Seal] JOSEPH J. Y. YOUNG,
Notary Public in and for the County of Alameda, State of California.

[Endorsed]: Filed Aug. 1, 1930. [8]

[Title of Court and Cause.]

ANSWER OF DEFENDANT SOUTHERN PACIFIC COMPANY.

Comes now the defendant above named and answering plaintiff's complaint herein shows as follows:

I.

Answering the allegations of Paragraph I of plaintiff's first alleged cause of action, and the same allegations in so far as they are incorporated into the second alleged cause of action, defendant admits that some of its offices and officers are located within the jurisdiction of this court, but denies that all of its offices or officers are so located, and in this behalf alleges that its principal place of business is and was at all times mentioned in the complaint, located in the city of Anchorage, State of Kentucky. Upon the ground that this defendant has no information or belief upon the subject, sufficient to enable it to answer, it denies that plaintiff is, or at any time mentioned in the complaint, or herein, was, a resident of Alameda County, State of California, or the State of California, or was domiciled therein, or was resident or domiciled elsewhere than in [9] the State of Kentucky. Admits that with respect to some of the business and activities of defendant it is a common carrier by railroad, engaged in interstate commerce, but denies that it was engaged as a common carrier by railroad, or otherwise, or in interstate commerce, with reference to or relation to any matter referred to in the complaint. Denies each and every, all and singular, conjunctively and disjunctively, the other allegations of said Paragraph I.

II.

Answering the allegations of Paragraph II of plaintiff's first alleged cause of action, and the same allegations in so far as they are incorporated into plaintiff's second alleged cause of action, defendant

admits that it is a corporation incorporated and existing under the laws of the State of Kentucky, and domiciled in said state. Denies each and every, jointly and severally, conjunctively and disjunctively, the other allegations of said Paragraph II.

III.

Answering the allegations of Paragraph III of plaintiff's first alleged cause of action, and the same allegations in so far as they are incorporated into plaintiff's second alleged cause of action, defendant alleges that the accident referred to in the complaint herein, in so far as it is admitted to have happened by this answer, happened at about 3:15 o'clock, P. M., on the 25th day of March, 1930. Alleges that the part of the apparatus for supplying the locomotive with fuel oil which plaintiff handled, in connection with the refueling of locomotive 2604, on the occasion of the accident referred to in the complaint, was known as the oil spout, not the oil beam. Admits that while plaintiff was engaged in refueling said locomotive said locomotive [10] backed. Upon the ground that this defendant has no information or belief upon the subject sufficient to enable it to answer, it denies that the said locomotive engine or locomotive or engine backed automatically, or backed suddenly, or with any violence, or with such violence that plaintiff was in anywise or at all struck, or thrown in anywise or at all, or that thereby or in any way alleged in the complaint plaintiff was in anywise or at all injured.

IV.

Answering the allegations of Paragraph IV of

plaintiff's first alleged cause of action, and the same allegations in so far as they are incorporated into plaintiff's second alleged cause of action, defendant admits that prior to the receiving of any injury of which plaintiff complains, the locomotive engine upon which plaintiff was working was run under the oil spout by defendant's hostler for the purpose of supplying fuel oil to said engine. Denies each and every, jointly and severally, conjunctively and disjunctively, the other allegations of said Paragraph IV.

V.

Answering the allegations of Paragraph V of plaintiff's first alleged cause of action, defendant admits that at the time and on the occasion of the accident referred to in the complaint herein, plaintiff was engaged in supplying the locomotive referred to with fuel oil. Admits that said locomotive on some occasions, but not on any occasion referred to in the complaint herein, was assigned to handle and transport interstate commerce. Alleges that said locomotive on some occasions and at the time and on the occasion of the matters referred to in the complaint herein and in this answer was assigned to handle and transport only intrastate commerce. Denies each and every, all and singular, conjunctively [11] and disjunctively, the other allegations of said Paragraph V.

VI.

Answering the allegations of Paragraph VI of plaintiff's first alleged cause of action, defendant admits that plaintiff while working on the locomotive

referred to in the complaint herein, came in contact with a portion of the cab of said locomotive, and thereby received of the injuries referred to in the complaint the following: Bruises on his body, but in this behalf defendant alleges and says that they were minor bruises, and that plaintiff had completely recovered from the effects of said bruises by about the 14th day of April, 1930. Admits that on account of injuries received by coming in contact with the portion of said cab as aforesaid, plaintiff was confined in the White Memorial Hospital at Los Angeles, from March 26th, 1930, until the 14th of April, 1930, and that on the 15th of April, 1930, he was transferred to the Southern Pacific Hospital, in San Francisco, where he was confined until the 7th day of July, 1930, and in this behalf defendant alleges that on the 7th day of July, 1930, he left said hospital without the permission of defendant or the physicians employed by defendant, or the physicians then treating plaintiff and against the advice of said physicians. Admits that during said specified times plaintiff suffered such physical pain as was normally attendant upon the type of injury received by him, but denies that he suffered any mental or excruciating pain or any other pain, except such as is herein expressly admitted. Upon the ground that this defendant has no information or belief upon the subject sufficient to enable it to answer, it jointly and severally, conjunctively and disjunctively, denies the allegations of said Paragraph VI, that at the time of his injuries plaintiff [12] was the age of thirty-two years and an able-bodied, healthy man, and that he is still confined in a hospi-

tal and still suffering pain, both physical and mental. Admits that at the time and shortly prior to the time plaintiff was injured, as herein admitted, he was earning the sum of five and 07/100 dollars ($5.07) per day, seven days per week, but in this behalf alleges that the normal wages for the work for which plaintiff was employed before that time, and after the time of said injury, was and is the sum of two and 88/100 dollars ($2.88) per day, seven days per week, and no more, and that said rate of five and 07/100 dollars ($5.07) per day, seven days per week, was only an abnormal and temporary rate. Denies each and every, conjunctively and disjunctively, jointly and severally, the other allegations of said Paragraph VI.

VII.

Denies each and every, jointly and severally, conjunctively and disjunctively, the allegations of Paragraph VII of plaintiff's first alleged cause of action.

And answering plaintiff's second alleged cause of action, in addition to the showing heretofore made with respect to the allegations of the first cause of action incorporated in the plaintiff's second alleged cause of action, defendant shows as follows:

I.

Answering the allegations of Paragraph II of plaintiff's second alleged cause of action defendant admits that on the 25th day of March, 1930, plaintiff was employed by defendant as a hostler's helper, and at that time was receiving therefor compen-

sation at the rate of five and 07/100 dollars ($5.07) per [13] day, seven days per week, but in this behalf alleges that the normal wages for the work for which plaintiff was employed before that time, and after the time of said injury, was and is the sum of two and 88/100 dollars ($2.88) per day, seven days per week, and no more, and that said rate of five and 07/100 dollars ($5.07) per day, seven days per week, was only an abnormal and temporary rate. Admits that as part of the duties as said hostler's helper plaintiff was required to fill tanks of the locomotive engines of defendant with fuel oil. Denies each and every, conjunctively and disjunctively, jointly and severally, the remaining allegations of said Paragraph II.

II.

Denies each and every, jointly and severally, conjunctively and disjunctively, the allegations of Paragraph III of plaintiff's second alleged cause of action.

III.

Answering the allegations of Paragraph IV of plaintiff's second alleged cause of action, defendant admits that while plaintiff was working on the locomotive referred to in the complaint, he came in contact with a portion of the cab of said locomotive, and thereby received of the injuries referred to in the complaint the following: Bruises on his body; but in this behalf defendant alleges that said bruises were only minor bruises, and that plaintiff had completely recovered from the effects of the same by about the 14th day of April, 1930. Upon the

ground that this defendant has no information or belief upon the subject, sufficient to enable it to answer, it denies that by reason of any injury or matter alleged in the complaint, plaintiff was compelled or did employ any physician or surgeon, or in anywise or at all became liable for any hospital or nurse's or medical [14] attention or doctor's bill in the sum of two thousand dollars, or in any other sum, or that two thousand dollars ($2,000), or any sum, is the reasonable or usual charge or cost for said service, or any alleged service, or any service received by plaintiff, or that no part thereof has been paid. Denies each and every, jointly and severally, conjunctively and disjunctively, the other allegations of said Paragraph IV.

IV.

Answering the allegations of Paragraph V of plaintiff's second alleged cause of action, defendant admits the allegations contained in the first sentence of said numbered paragraph. Admits that plaintiff suffered the physical pain usually attendant upon the type of injury received by plaintiff and herein admitted, but denies that plaintiff suffered any other pain whatsoever. Admits that at the time of plaintiff's injury plaintiff was receiving the sum of five and 07/100 dollars ($5.07) per day, but in this behalf re-alleges the matter heretofore set out in Paragraph I of this answer to plaintiff's second alleged cause of action. Denies that any injury of plaintiff is permanent. Upon the ground that this defendant has no information

or belief upon the subject sufficient to enable it to answer, it denies, each and every, jointly and severally, conjunctively and disjunctively, the remaining allegations of said Paragraph V.

V.

Denies each and every, jointly and severally, conjunctively and disjunctively, the allegations of Paragraph VI of plaintiff's second alleged cause of action.

And for a second and separate defense as to each of plaintiff's alleged causes of action, defendant shows as follows: [15]

I.

At the time and on the occasion of the accident referred to in plaintiff's complaint herein plaintiff was employed by defendant as a hostler's helper, and had been so employed for a considerable period prior to the 25th day of March, 1930. At the time and on the occasion of the accident referred to plaintiff was thoroughly familiar with the character of his said employment and the duties incident thereto.

II.

At the time and on the occasion of the accident referred to, plaintiff, while engaged in his duties as aforesaid, was on the top of a tender of a locomotive of this defendant. While there, and in the performance of his said duties, and in loading fuel oil into the tender of said locomotive, said locomotive moved backwards, and as the same moved

plaintiff so carelessly and negligently conducted himself on the top of said tender, and in and about the performance of his said duties as hostler's helper as aforesaid, as to cause himself to fall against the top of the cab of said locomotive, and thereby received the injuries, if any, complained of.

And for a third and separate defense to both of plaintiff's alleged causes of action, defendant shows as follows:

I.

Incorporates by reference, as fully as though herein set forth at length, the allegations of Paragraph I of defendant's second defense to plaintiff's alleged causes of action.

II.

In the ordinary course of the performance of his duties as such hostler's helper; plaintiff was required to go upon the top [16] of tenders of locomotives and to fill tenders of locomotives with oil, and he was required to be on or about locomotives, both when the same were standing still and when the same were in motion. It was a normal condition of said locomotives, and of the top of the tenders thereof, that the same should be covered with oil to such an extent as might cause a person walking thereon to slip. Plaintiff's duties further required him to be on the top of tenders of locomotives and working about the tenders of locomotives while the same were in motion. All of the foregoing facts were at all times herein mentioned well known to plaintiff. In addition it was part

of the duties of plaintiff to place fuel oil in the tenders of locomotives, and plaintiff was well acquainted with the method of performing such duties and risks attendant thereon, and, particularly, the risk that said locomotive or tender might move while the same was being fueled, and the risks attendant upon such movement while the same were being fueled as aforesaid.

III.

Under all the circumstances aforesaid, at the time and on the occasion of the accident complained of by plaintiff, plaintiff was fueling a locomotive with fuel oil, and while the same was being so fueled the same moved, and as a result thereof plaintiff received the injuries, if any, complained of, and he received the same as herein alleged and not otherwise, and he received the same by reason of the risk of his said employment and a risk assumed by him in the course of his said employment.

And for a fourth and separate defense to both of plaintiff's alleged causes of action, defendant shows as follows:

I.

At the time and on the occasion of the accident referred [17] to in the complaint herein, plaintiff was engaged and employed by this defendant as a hostler's helper in intrastate commerce, and at the time and on the occasion of the accident of which plaintiff complains, plaintiff and defendant were engaged in intrastate commerce, and the in-

juries, if any, received by plaintiff, were received in the course of his said employment in intrastate commerce.

II.

At said time and on said occasion, defendant had secured the payment of any compensation which might be payable by it to any of its employees, engaged in intrastate commerce, within the State of California, and injured in the course of employment in said business, by qualifying as a self-insurer and by securing from the Industrial Accident Commission of the State of California a certificate of consent to self-insure, which certificate was then and there in full force and effect. Said certificate had been given by said Commission upon the furnishing of proof by defendant, Southern Pacific Company, which proof was satisfactory to said Commission, of the ability of defendant to carry its own insurance, and to pay any compensation that might become due to any of its employees.

III.

At the time and on the occasion of the accident referred to in the complaint herein, plaintiff was acting in the course and scope of employment in intrastate commerce in the State of California. This Honorable Court has no jurisdiction of the subject matter of the above-entitled action, nor of the parties thereto, and the Industrial Accident Commission of the State of California has sole jurisdiction to determine any and all matters with respect to the accident and injuries, if any there

were in [18] fact, referred to in plaintiff's complaint herein.

And for a fifth and separate defense to each of plaintiff's alleged causes of action, defendant shows as follows:

I.

Incorporates by reference, as fully as though, herein set forth at length the allegations of Paragraphs I and II of defendant's fourth and separate defense to each of plaintiff's alleged causes of action.

II.

After the accident referred to in the complaint, and after the receipt of such injuries as were received by plaintiff at said time and on said occasion, defendant performed all acts and did all things required of an employer, with respect to an injured employee engaged in intrastate commerce, and injured in the course and scope of his employment, in the State of California, as required by the statutes of the State of California, and particularly the Workmen's Compensation Act of the State of California, and tendered to and provided for plaintiff medical attention from the time of the accident, up until the 7th day of July, 1930, when plaintiff, against the advice of the physicians employed by defendant, and without their permission and consent, and without the permission and consent of defendant, left the hospital provided by defendant, and refused and does still refuse all further medical attention or service from defendant. Up to said

time defendant had provided all such medical, surgical, hospital, nursing, and other attention and service, as was required by such injuries as plaintiff had received. In addition thereto, after the accident referred to in plaintiff's complaint, defendant tendered to and paid to plaintiff, and plaintiff received from defendant, all pursuant to the Workmen's Compensation [19] Act of the State of California, compensation, and compensation required to be paid by an employer to an employee injured in intrastate commerce within the State of California, as required by the statutes of the State of California.

II.

Incorporates by reference, as fully as though herein set forth at length, the allegations of paragraph III of defendant's fourth and separate defense to plaintiff's alleged causes of action.

WHEREFORE, defendant prays that plaintiff take nothing by his complaint herein, and that defendant have judgment for its costs of suit, and for such other, further and different relief as, the premises considered, is proper.

DUNNE, DUNNE & COOK,
A. B. DUNNE,
Attorneys for Defendant. [20]

State of California,
City and County of San Francisco,—ss.

G. L. King, being first duly sworn, deposes and says:

That he is an officer, to wit, the Assistant Secre-

tary of Southern Pacific Company, a corporation, the defendant in the above-entitled action, and as such makes this verification, for and on behalf of said defendant; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information or belief, and that as to those matters he believes it to be true.

G. L. KING.

Subscribed and sworn to before me this 9th day of October, 1930.

[Notarial Seal] FRANK HANNEY,

Notary Public in and for the City and County of San Francisco, State of California.

Receipt of a copy of the within answer is hereby admitted this 10th day of October, 1930.

THOMAS F. McCUE,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 10, 1930. [21]

In the Southern Division of the United States District Court for the Northern District of California.

No. 18,791–K.

J. C. WALTON,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

JUDGMENT ON NONSUIT.

This cause having come on regularly for trial on the 24th day of February, 1931, before the court and a jury of twelve men, duly impaneled and sworn to try the issues joined herein; Thomas F. McCue, Esquire, appearing as attorney for plaintiff, and A. B. Dunne, Esquire, appearing as attorney for defendant, and the trial having been proceeded with on the 25th day of February, 1931, in said year and term and oral and documentary evidence having been introduced on behalf of the plaintiff and the attorney for the defendant having, at the close of plaintiff's case, moved the court for a judgment of nonsuit, and the Court after hearing arguments and fully considering said motion, having ordered that said motion be granted and that a judgment of nonsuit be entered herein with costs to the defendant:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the court that plaintiff take nothing by this action, that judgment of nonsuit be and the same is hereby, entered against said plaintiff herein, that defendant go hereof without day, and that said defendant do have and recover of and from said plaintiff its costs herein expended taxed at $535.00.

Judgment entered February 25th, 1931.

WALTER B. MALING,
Clerk. [22]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on the 24th day of February, 1931, the above-entitled cause being regularly on the calendar of the District Court of the United States for the Southern Division of the Northern District of California, came on regularly for trial before a jury and the Court. Thomas F. McCue appeared as attorney for plaintiff and Messrs. Dunne, Dunne and Cook, appeared for the defendant. Thereupon, the following proceedings were had.

Mr. McCue, as counsel for the plaintiff, made an opening statement for plaintiff, and in the course of said opening statement stated in part as follows: "On the 25th day of March, 1930, while the plaintiff was engaged by the defendant and working regularly as an assistant hostler—the evidence will develop that a hostler is a man who takes care of the engines after they are taken out of the daily service—he prepares them for the next day's service, in refueling them, that is, putting in fuel oil, as they do here and at other places, and the supplying of it with coal, and water, and sand. When "that is done the hostler takes the engine to the roundhouse. When the engine is called upon again the hostler takes it out of [23] the roundhouse and delivers it to the engineer or the man who is to take it from him. In a few words, that is about what we will show in regard to a hostler.

"We will show that Mr. Walton was at that time an assistant hostler. The assistant does practically the same work as a hostler, with the exception that he did not have charge of the operation of the engine; the hostler has charge of the engine. The duties of the assistant hostler require him to supply the tank or dome, or whatever they may call it, with fuel oil and with water, and with sand that is needed down in the sand-box, that is, if sand is needed down there he supplies the sand, and anything else that is needed in the nature of preparing the engine for its regular work, excepting the mechanical work, he has nothing to do with the mechanical part of it.

"The plaintiff was thus engaged on the 25th of March, 1930, in the yards. An engine that was used on the day shift that day, I think it went into service aroun*t* 7 o'clock or 7:30 in the morning, this was the only switch engine that was used during the shift of that engine. We expect to show that that particular engine, during that day and other days, was used indiscriminately in handling and switching cars that came from out of the state, cars that were billed in California to points outside the state, and it also handled some local shipments which, under the law, is called intrastate commerce; the other class of commerce, that is, that comes out of the state, or that is shipped from points in other states into California is called interstate commerce.

"That this engine, on March 25, 1930, when it had finished its shift, which the evidence will show to have been about ten minutes after three in the

afternoon, it was turned over to the hostler; that the hostler then took the engine on to a track that is called track No. 2." [24]

Mr. McCue further stated, as part of such statement, that the hostler then spotted the engine to take on supplies, and that the plaintiff assisted him, and while assisting and standing on top of the engine tender was injured when the engine was moved.

"Mr. DUNNE.—If your Honor please, in view of counsel's opening statement we can avoid a lot of trouble and perhaps a lots of documentary evidence by stipulating to certain facts. I will follow counsel's opening statement in offering to stipulate to those facts.

That, in the first place, Colton is a station on the line of the Southern Pacific, and that that station is on a part of the main line of the Southern Pacific, running out of Los Angeles and toward and across the Arizona border. We make no question about that.

Second: That at the station of Colton there is a switch-yard, and that that switch-yard is wholly within the state of California.

Thirdly: That in that switch-yard, and in the normal course of the business of this defendant, switching movements are made which are both interstate and intrastate in character.

Next: That the particular switch-engine in question was assigned to the Colton yard, and was used indiscriminately, to use counsel's own statement, in interstate and intrastate commerce.

And lastly: That on the day of this accident it had been on the seven o'clock in the morning shift; that that shift terminated at three o'clock in the afternoon normally, but there was a little bit of overtime carrying that particular time to 3:10 or 3:15; at any rate, that shift had been completed, the switching crew had brought the engine in and placed it on the roundhouse receiving track, and had left it and the hostler [25] had taken charge of it."

Mr. McCue, as counsel for the plaintiff, thereupon accepted said stipulation.

TESTIMONY OF. J. C. WALTON, ON HIS OWN BEHALF.

J. C. WALTON, on behalf of himself, testified as follows:

"I am the plaintiff; I am 32 years old; I was employed by the Southern Pacific Company in its yards at Colton, California, as a hostler's helper from January 2, 1930, to March 25, 1930, about 4 P. M., when I was hurt.

My duties as such were to line switches, taking engines around the wye, putting fuel oil in tanks, putting water in tanks, putting sand in the dome and filling lubricators. That was my orders from the roundhouse foreman; he was in charge of the work in that respect and is the main boss.

Q. On March 25, were you preparing engine No. 2604 there in the yards next day?

Mr. DUNNE.—That is objected to as immaterial, irrelevant, and incompetent, calling for his conclu-

(Testimony of J. C. Walton.)

sion as to what he was doing, and without foundation.

The COURT.—Objection overruled; exception.

A. Yes, for the next shift that it went out on; I don't know whether it was eleven o'clock that night when one went out or seven o'clock the next morning; the engine was supplied for one of those shifts.

Q. State whether or not that was a regular operation on your part in preparing this engine for going into the next service. A. Absolutely.

Q. Did you do that daily?

A. Daily on my shift, from 3 o'clock P. M. until 11 o'clock."

On March 25, 1930, Harry Lord, the hostler, was in charge [26] of engine No. 2604; I don't know from whom he received that engine on that day; the engineer who usually works that seven o'clock to three o'clock shift is Percy. When Lord received the engine I got on the front end and gave him a signal to back the oil-tank and water-tank. He did so. He spotted the engine for the sand-dome and I put sand in the dome on top of the engine and then walked back across the top of the engine and the cab and got over the oil-tank and gave him the signal to back up and spot it for oil. On this engine water and oil can be taken on the one spotting if you get it right; as soon as he spotted the engine at the place to take fuel oil, I was on top of the oil-tank. The engine was perfectly still; I walked back over the cab to the oil-manhole. Then

(Testimony of J. C. Walton.)

I gave the signal to back up. I was standing at the oil-hole. When I was in that position the hostler was taking water. When he spotted the engine and while I was on the tank he was pulling the throttle backing it up. He occupied the engineer's seat. When the engine was spotted I got the oil hook and pulled the beam over and opened the manhole. There is a big steel telescope that you put down to the manhole. Then I turned on the oil. This particular tank is low and the spout hardly comes plumb with the level of the hole but it comes far enough so that you can take oil easily without the oil splashing out. The mouth of the spout extends half an inch or an inch into the opening. You have to pull it full length. At that time when I pulled the spout down Lord, the hostler, was taking water. He came right up immediately when I told him we needed oil and while I was reaching for the hook and pulling the beam around he was taking water—getting ready to take water."

Q. Did he leave anybody in charge of the engine? A. No, sir.

"I turned around then and looked at my oil gage; the [27] engine was headed west; the oil gage is in the left-hand corner of the tank back of where the fireman sits. It is not near where the fireman sits but is back from there on top. I turned around to look at my gage, and as I turned around the engine watchman, Alfred Roxie, climbed into the cab; that is the first time I had seen him that afternoon on the shift, he went to work at

(Testimony of J. C. Walton.)

three o'clock. I spoke to him. He immediately put on the injector on the boiler—sat down in the fireman's seat and put his arm out like this. The purpose was to inject water into the boiler. I looked at my oil gage and saw the tank was about filled and turned around, caught the oil beam and started turning it slowly, to keep the tank from running over. The engine moved back while I was in that position, cutting off my oil; the oil spout struck me here (indicating his breast); it caused that to strike me in the chest because I was right against it turning it off; it knocked me off my balance; when the engine moved it only had to move that far to jerk the spout out, the oil was still running and it knocked me back across the cab.

I don't know who turned the oil off and I don't know who stopped the engine. I was conscious I would say for a minute. I was lying there. I just looked up and seen the steel beam, I had pulled down the telescope, the cab had jerked that off. Mr. Lord was taking water at the time I was hurt, I looked to see if I could see him, but he was gone. Then I don't remember any more. I don't remember getting off the engine. I don't remember anything after that, don't even know where they took me.

Q. You may state whether or not you know that that engine had at any time around that period, or during the time you were there, moved on other occasions of its own accord.

(Testimony of J. C. Walton.)

Mr. DUNNE.—That is objected to as immaterial, irrelevant and incompetent, what happened on other occasions under [28] different circumstances, as having no bearing on what happened on this particular occasion. It is without foundation. It calls for hearsay.

The COURT.—Objection overruled; exception.

A. On the 22d day of March, 1930, on that particular shift from 3 to 11, we coupled into 2604 with a 5,000 engine; that is, 5,000 and something. Mr. Lord said that we would supply both of them at once and then we will pull 2604 upon the track and cut it off. So I was riding, naturally, on the running-board of the engine, where you uncouple them. I gave him the signal to stop when we got up. He did. I pulled the pin. The engine started backwards. I had to run twenty or thirty steps to catch it.

Counsel for the defendant thereupon moved to strike out the testimony with respect to the movement of the engine on this occasion upon the ground that there was no similarity of circumstances shown, consequently no foundation and that the matter was immaterial, irrelevant and incompetent; that what happened on other occasions under different circumstances had no bearing on this case.

The COURT.—You may renew your motion.

From my experience as a hostler and working there in the yards, I know when a throttle is closed and shut off. When this engine on March 22, 1930, moved as I have described, Mr. Lord and I

(Testimony of J. C. Walton.)

examined the throttle. It was closed tight; Mr. Lord and I together told the machinist on duty, Cornelius Peters, that engine moved of its own accord. The track where this engine was spotted on this occasion was track No. 2.

From March 26 to April 14 I was in the White Memorial Hospital at Los Angeles. Then I was placed in the Southern Pacific Hospital at San Francisco, where I remained till July 7th, [29] I had to lie on my back for eighty-four days. After I left the Southern Pacific Hospital I employed Dr. W. L. Bell. He put a plaster of paris cast on me. Then he had this neck support. I cannot take the cast off at all. I can take this (neck support) off, but if I go a half a day without this brace on my neck the top of my head gets so sore I can't comb my hair on top.

My nerves are all torn up. I can't gain any strength at all. I have lost considerable weight; I cough and occasionally spit up blood. For a long time every day I had sinking spells; now about once a week I have sinking, smothering spells. I am short of breath all the time. Beads of perspiration pop out on me and I get deathly sick. I have terrible pains at the base of my head where the spine joins the brain. My neck and back pains all the time.

Prior to the accident for ten or fifteen years I cannot recall being sick. I had no doctor bills; had no pain in my body. At all times prior to the accident I was able to perform manual labor and

(Testimony of Dr. W. L. Bell.)

experienced no difficulty in performing it. I am not now able to perform any manual labor or railroad work.

TESTIMONY OF DR. W. L. BELL, FOR PLAINTIFF.

Dr. W. L. BELL, testified as follows:

My offices are in Oakland, California. I am a duly licensed and practicing physician and surgeon; have practiced for thirty-three years. My work has been mostly confined to bones for the last fourteen years. I met Walton in July, 1930. I have cared for him as a patient. I took his pulse. It was very irregular—from 70 to 120. 120 is a rapid pulse. In this case I think it indicates some nerve irritation, perhaps a muscular weakness of the heart, itself, as a result of his long illness. I have every reason to believe that the illness was caused by an injury. [30]

X-rays taken under the supervision of Dr. Bell were filed in evidence.

Q. You have stated that you tried to straighten his spine and though you attempted to do that it still has the curvature which that picture shows; is that correct? A. Yes.

Q. What would cause that curvature?

A. Compression, first, of the spinal column to throw it out of line, then later scarred tissue, muscular contraction. An injury is about the only thing it is the result of.

(Testimony of Dr. Etter.)

I think the condition I found on my several examinations of the patient is permanent and it is very doubtful that he will ever be able to perform manual labor.

TESTIMONY OF DR. ETTER, FOR PLAINTIFF.

Dr. ETTER testified:

I am a regular practicing physician and surgeon of California. I have followed neurology in my work particularly. I examined the plaintiff. The first time was on September 29, 1930. I put in the biggest part of an afternoon.

The patient complained of diminished sensation in certain regions, and with the pin-prick test you determine certain areas where he had a diminished sensation, and the areas where there was a lack of sensation. I put the pins in his person enough to make it bleed. I applied a test to the back of the head, back of the scalp, and in the region up above the ear, over the upper part of the shoulder, down the outer part of the arm, the right thumb, and the index finger, and part of the middle finger. He did not have the power in his right hand that he did in his left. Lack of power is produced by nerve injury. The muscolospiral nerve, the one that was particularly concerned in this case. In the back of the neck there is the occipital nerve and the auricular nerve. They all have their origin in the [31] cervical region. I should say that the lack of feeling and sensation in the arm, and

(Testimony of Dr. Etter.)

shoulder, and neck, and the part of the head was caused by a blood clot that would cause pressure. My deductions as to the condition of the nerves were that they were damaged. I would say that the damage or injury to the nerves would be more or less permanent after this length of time. The condition of the nerves which I have described I would say that it was a blood clot, and the formation of scar tissue that would pinch the nerves and cause pressure on the nerves. A severe blow or injury would cause rupture of a blood vessel. I would say that those conditions are permanent and that they are reasonably certain to continue and cause the plaintiff difficulty and pain throughout his life.

TESTIMONY OF J. C. WALTON, ON HIS OWN BEHALF (RECALLED).

J. C. WALTON, recalled, and resumed his testimony.

The plaintiff as to the balance of his direct examination gave testimony tending to show and explain his injuries.

Cross-examination by Mr. DUNNE.

At the time of the accident my shift was from three P. M., to eleven P. M. I have no memorandum to fix in my mind the date March 22d of the incident when engine 2604 was coupled on to engine 5000. It was shortly after the shift started on three o'clock on that day.

(Testimony of J. C. Walton.)

Q. Assuming that the brakes are not on, the reverser is centered, and the throttle is closed, is it your testimony that the only way to explain the movement of a locomotive is a throttle leak?

A. I would not say that.

Q. I say, is there anything other than a leaky throttle which will explain an engine moving under those circumstances?

A. There might be some defective parts that would cause it to move.

Q. What? A. I don't know.

Q. Suppose it were standing on a grade, Mr. Walton? A. With the air on?

Q. With the air off.

A. Of [32] course, anybody would know it would move then, but it was not on a grade down there.

Q. Will you say now positively that Track No. 2, near the water track at Colton at that time, did not have a slight grade eastward?

A. It is level now and was then.

Q. Did you have a conversation with a man from the Claims Department at the Southern Pacific Hospital with respect to the payment of compensation to you?

Mr. McCUE.—That is objected to as immaterial.

The COURT.—Objection overruled; exception.

A. With respect to compensation?

Mr. DUNNE.—Q. The payment of some money to you. We will not characterize it yet as compensation. The payment of some money to you.

(Testimony of J. C. Walton.)

A. Well, I can't remember the name, I remember somebody coming up there after I was there. I think I would know him if I were to see him. He is a big, tall man.

Q. Mr. Leure, does that help your memory?

A. I don't remember the name, at all. He came up—

Q. Just a moment. Do you recall that you had a conversation with him with respect to the payment of money?

A. Well, if that is the gentleman, if that is his name, I would not say it was until I saw the man, if I can see the man I can tell you positively "Yes" or "No."

Q. You did have some conversation with some man?

A. With some claim agent from Mr. Newman's office.

Q. Is it not a fact that in the course of that conversation that claims agent told you that your case fell under the California State Workmen's Compensation Act?

Mr. McCUE.—That is objected to as immaterial, irrelevant, and incompetent, not proper cross-examination, and not a proper question under the issues in this case. [33]

The COURT.—I suppose it is preliminary. Objection overruled; exception.

A. He might have, but that did not make me know whether he was telling the truth, or not.

Mr. DUNNE.—Q. Of course it didn't.

(Testimony of J. C. Walton.)

A. He might have. I won't say "yes" or "no." I don't know.

Q. You won't say that he did not?

A. I won't say that he did not. I don't remember the conversation. I remember talking to some claims agent, a big tall man from Mr. Newman's office. I would not remember the date, I would not try to, because I couldn't.

Q. Is it not a fact that during the course of that conversation you objected to the payment, taking the position that your case did not fall under the California State Workmen's Compensation Act?

Mr. McCUE.—The same objection.

The COURT.—The objection is overruled.

A. Well, if this was the gentleman, Mr. Dunne—what did you say his name was?

Q. Mr. Leure.

A. If it was Mr. Leure, a big, tall gentleman, he came over and placed his hands down on the bed—

The COURT.—Just answer the question.

Mr. DUNNE.—Q. Did you have such a conversation with him, in which the applicability of the California State Workmen's Compensation Act to your case was discussed?

Mr. McCUE.—The same objection as last interposed.

A. I don't remember.

Mr. DUNNE.—Q. Will you say you did not have such a conversation?

Mr. McCUE.—The same objection. Wait a moment.

(Testimony of J. C. Walton.)

Mr. DUNNE.—It is understood that to this line of questions [34] you have interposed the same objection, that it was overruled and an exception has been allowed, so that you will not have to repeat it. A. I won't say.

Q. I will ask you if after you had that conversation the Southern Pacific forwarded to you a voucher in payment to you under the California State Workmen's Compensation Act?

Mr. McCUE.—That is objected to for the reasons heretofore urged. There is no issue of that kind in this case. It is not within the issue. It is incompetent. This case is not based upon any compensation under any State law.

The COURT.—That is the heart of your objection, isn't it?

Mr. McCue.—Yes.

The COURT.—I don't know, but at this time I would say that the jurisdiction of this court in this case does not depend upon any conversation that these two gentlemen may have had. Is that your view?

Mr. DUNNE.—That is, of course, quite true, your Honor, but that conversation we now offer to prove, and it is specially pleaded in our answer, was followed up by the actual payment to this man and receipt by him of compensation under the so-called Workmen's Compensation Act.

The COURT.—The defendant is entitled to make that showing. Objection overruled; exception noted. Answer the question "Yes" or "No," if you remember.

(Testimony of J. C. Walton.)

A. Your Honor, can't I say why I accepted it?

Mr. DUNNE.—Q. I don't want to be unfair to the witness. Look at that paper writing, dated May 22, 1930.

A. I got a check, but I ask the Court to let me explain why I accepted that compensation.

Mr. DUNNE.—Q. Just look at that voucher, Mr. Walton, [35] and see if you did not receive that.

A. $175.28 for eight weeks compensation.

Q. Did you receive that voucher?

A. Yes, I received this voucher.

Q. Look on the back of it, and see if you did not forward it to your wife and have her endorse it and cash it? A. Yes.

Q. And that was paid to you.

A. That was paid to me.

Mr. DUNNE.—We will offer this in evidence. As this is the original record, your Honor, I ask to substitute a photostatic copy.

Mr. McCUE.—There will be no objection to the introduction of this document as was made to the testimony relative thereto.

The COURT.—Objection overruled. Exception.

Mr. DUNNE.—In introducing this, your Honor, I will ask leave to introduce the photostatic copy instead of the original. (The document was here marked Defendant's Exhibit "A." It is prayed that the original of said exhibit be attached to the transcript on appeal and forwarded with the same as part thereof to the Appellate Court.)

Mr. DUNNE.—Q. Now, Mr. Walton, don't you recall that in discussing this matter with a South-

(Testimony of J. C. Walton.)

ern Pacific Claims Agent, or at least a man who said he was that, they told you that when you gave the word thereafter they would send you compensation under the State Act every two weeks?

A. He didn't say that—

Mr. McCUE.—Wait a moment, the same objection.

The COURT.—You have the same objection. You don't have to repeat it. It is understood you have an objection to all this line of testimony, and the objection is overruled, [36] and an exception taken.

WITNESS. — (Continuing.) I received the paper now shown to me and received the payment called for on that voucher.

(Thereupon the paper referred to was offered and received in evidence, marked Defendant's Exhibit "B," and it is prayed that the original of said exhibit be attached to the transcript on appeal and forwarded with the same as part thereof to the Appellate Court.)

WITNESS.—(Continuing.) I got this paper (referring to paper exhibited). I remember getting three.

(Thereupon the paper referred to was offered and received in evidence, marked Defendant's Exhibit "C," and it is prayed that the original of said exhibit be attached to the transcript on appeal and forwarded with the same as part thereof to the Appellate Court.)

(Testimony of J. C. Walton.)

WITNESS.—(Continuing.) At the time I was employed by the Southern Pacific I had no prior railroading experience.

Redirect.

That place where the engine was standing and I was supplying it with fuel oil was level, apparently level. The reason why I say it was level, if I may speak this way, if the Court please, I have put that particular 2604 engine on the spot, myself, and supplied it there, and released the air, and it will be about, well, say, fifteen or twenty seconds until you get enough steam into the chest just to move it. So it did not move with me. I have coupled it on to other engines and pulled it up, like me and Mr. Lord did, to supply it, and spot it there for fuel and things—not it, but other engines like it, the 3700 type, the 2600 type, and the 5000 type, we have spotted them there with the engine in front and cut them [37] loose, no air on—the air was off—and they stood perfectly still.

TESTIMONY OF LELLA MAY WALTON, FOR PLAINTIFF.

LELLA MAY WALTON, called for the plaintiff —the wife of the plaintiff:

We have been married four years. I knew Mr. Walton for about six months before we were married. From the time we were married up until he was injured we lived together continuously as

(Testimony of Lella May Walton.)

husband and wife. I cannot say that he ever has been sick, not to the extent of being in bed.

I never knew of him to be unable to perform his usual work. He never complained of any pain prior to the time of his injury in this case. Since he was injured I observed that he has perspired. The perspiration is cold and clammy. In July, 1930, we lived in Oakland. I observed his appearance and actions during that time. He could not at that time sit in any position any length of time, not even to lie down. He kept us awake most of the night, off and on during the night, either getting up so that he could breathe better, or perhaps after he had sat up a while he would return to bed. He would get up frequently nights. That condition still exists.

TESTIMONY OF CHARLES HENRY ORTH, FOR PLAINTIFF.

CHARLES HENRY ORTH, called for the plaintiff.

For the last thirty years I have been a locomotive engineer. I have been employed by the Southern Pacific Company. After I left the Southern Pacific I was employed by the Northwestern Pacific for the period of twenty-two and a half years. They had oil-burning engines. They use oil for fuel.

I looked over engine No. 2604 yesterday. It was down in what they call the bull-pen, in Los Angeles yard. It had automatic air. It has a throttle that

(Testimony of Charles Henry Orth.)

you pull overhead. Such an engine as No. 2604 when the reverse lever is on center and the throttle is shut off or closed, and there is air on it, it would not move of its own volition if on a grade that is .53 of [38] 1% if it had the brakes set. I don't believe it would move if the air was released and the throttle shut off; on such a grade as you mention. When the engine is standing upon a location similar to that you have described and the throttle is closed that engine would not move backwards so that the spout that goes down into the manhole would be thrown out of place. That engine with the throttle closed and the grade being as you have stated it to be (.53 of 1%) a leaky throttle would cause the engine to move of its own volition.

Q. On such a grade, would you state whether or not the engine would not move of its own volition unless it did have a leaky throttle.

A. Leaky throttle.

Q. That is true, is it? A. Yes.

Mr. McCUE.—Mr. Dunne, have you those car records this morning?

Mr. DUNNE.—Yes.

Mr. McCUE.—Maybe you intended that the stipulation should cover those papers.

Mr. DUNNE.—I thought it did, Mr. McCue.

Mr. McCUE.—Probably we can save the introduction of these,—I notice here in your stipulation you speak about the normal business in the yard. May I ask you whether the business of the shift that

(Testimony of Charles Henry Orth.)

this engine went into next after the injury was the normal business of the yard?

Mr. DUNNE.—Yes, we will add that to the stipulation, that on the morning of March 25, 1930, the day of the accident, this locomotive, 2604, was engaged from 7 A. M. until a little after 3 in the afternoon in doing switching operations in the Colton yard and that on that day, and in the course of those switching operations was handling indiscriminately interstate and intrastate commerce, that is, one job, which was one and [39] then it would do another job, which was the other. Now, do you want it as to what happened after the accident?

Mr. McCUE.—The next shift.

Mr. DUNNE.—Now, as to the next shift, I will stipulate to the fact, with the objection that it is immaterial, irrelevant, and incompetent, that on the next shift, from eleven o'clock P. M. on the 25th of March, 1930, until the end of that shift, which would be 7 o'clock A. M. on March 26th, 1930, that locomotive was again engaged in similar service.

Mr. McCUE.—With that statement, I do not think it is necessary for you to produce the records and incumber this record.

Mr. DUNNE.—We are straight on this, Mr. McCue, that at the time this accident happened, however, the engine had finished its work on the morning shift.

(Testimony of J. C. Walton.)

Mr. McCUE.—I think the evidence clearly shows what took place; that is, as far as shift is concerned, as far as the engine performing any service itself was concerned in the nature of switching that day, when it was turned over to the hostler I apprehend that it had finished its shift.

Mr. DUNNE.—That is right.

Mr. McCUE.—With that statement, I will waive the production of the car records. I would like to recall Mr. Walton for a few questions I overlooked asking him yesterday.

TESTIMONY OF J. C. WALTON, ON HIS OWN BEHALF (RECALLED).

J. C. WALTON, recalled.

Q. Mr. Walton, did you know what the duties of the hostler in the Colton yard were during the period covered by this matter?

The COURT.—Now, just a moment; can't you gentlemen agree on what the duties of a hostler were?

Mr. DUNNE.—I think we can. A hostler is a person who is connected with the roundhouse, and whose duty it is to move [40] engines in and out of the roundhouse for purposes of services, receiving them, and taking them out again when assigned to duty.

The COURT.—When the engines come off what we might call the live tracks.

Mr. DUNNE.—When they come off the switch-

(Testimony of J. C. Walton.)

ing tracks they are put on the roundhouse receiving tracks, and are left there by their crews and the hostler goes on the engine and does whatever is necessary about the roundhouse, moving the engine, spotting it and taking on supplies, running it over the turntable, and putting it in the roundhouse, itself, to put it to sleep.

Mr. McCUE.—And also his duty is to handle the engine. His duty is to supervise the supplying. And I make this statement—

The COURT.—Do you stipulate to that Mr. Dunne?

Mr. DUNNE.—Yes, I will stipulate to that, but I will not stipulate to what Mr. McCue is going to say, because I know what he is going to say.

Mr. McCUE.—His duty is to handle the engines. The assistant hostler's duty is to supply the necessary things to replenish the engine. The hostler's duty is to handle and take care of the engine. If we can agree on that, all right.

Mr. DUNNE.—I will agree to that, but it does not go far enough. He also, himself, may at times assist in supplying the engine.

Mr. McCUE.—I don't agree to that.

Mr. DUNNE.—I know you don't. I knew you would not. We will have to let that rest on the proof.

Mr. DUNNE.—I object to any question to this witness on the ground that it is without foundation and calling for the conclusion of the witness.

(Testimony of J. C. Walton.)

The COURT.—He may testify to facts, and not to [41] conclusions.

Mr. McCUE.—Certainly, your Honor. It is not my purpose to ever call those things out.

The COURT.—Proceed.

(Question read by the reporter.)

A. Yes.

Q. You will please state what they were.

Mr. DUNNE.—I make the objection that it calls for the conclusion of the witness, and is without foundation. This man is not a hostler. No foundation is shown.

The COURT.—Q. This is the first time you ever worked with a hostler, is it not?

A. I worked, your Honor, off and on before I was assigned a steady job, a few times with a hostler.

Q. With a hostler? A. Yes, as extra.

The COURT.—I will overrule the objection; exception.

A. The hostler's duty was to have that engine in charge at all times, have it under his control at all times, sit in the engineer's seat, where he had access to the throttle, the air, and all the manipulations which run in stopping an engine while I was doing my work on the engine, until I got through.

Mr. DUNNE.—I move to strike that out, your Honor. It is simply an argument from the witness.

The COURT.—The motion is granted; exception noted.

TESTIMONY OF FINIS L. ASKEW, FOR PLAINTIFF.

FINIS L. ASKEW, called for the plaintiff.

I live in Oakland. My business for the last number of years has been a railroad man. In the capacity of brakeman. The first experience I ever had as a railroad man was as fireman. As a brakeman I performed the duties of what is known as the head brakeman a number of times. That requires you to be in and about of the engine, in the cab.

Q. Assuming that a locomotive engine that is commonly [42] called a Mogul, is spotted at a place for the purpose of being supplied with fuel oil and water on a surface that appears to be level; if the throttle and the other appurtenances to the engine are in working condition, if the throttle is closed or shut off, if the reverse lever is on center, and the air is on, will such an engine of that kind move of its own volition?

A. No, sir.

Assuming that the throttle and other appurtenances of the engine are in proper working order and the air is off, the engine will not move of its own volition.

If an engine of this character moved backwards, or kicked backwards, I could tell you why it did that. A leaky throttle would be the main thing.

Thereupon the plaintiff rested.

Mr. DUNNE.—If your Honor please, the defendant wants to move for a directed verdict at this time, and in view of the rather complicated

nature of this case, because there happens to be four different statutes which may possibly be involved, I want to particularize somewhat and move for a directed verdict upon the whole showing and upon the whole case; also separately to move for a directed verdict as to each of the counts, the complaint being in two counts.

In the next place, we move for a directed verdict as to any issue of any defect with respect to any part of the locomotive except the throttle, my other motions having already included the throttle. I now move, because there are general charges of defects to the appurtenances of the locomotive, over and above the throttle—and, of course, there has been no evidence directed at anything except the throttle in that regard. I also move for a directed verdict on the special defense, that this man was paid compensation and received it pursuant to the State [43] Act, and after a conversation and agreement had in that regard. We do not have to go beyond the riders in that behalf.

As supporting those motions, and as a separate motion, we renew the motions to strike out and move to strike out any testimony of the plaintiff with respect to the movement of any engines on occasions other than the occasions of the accident and to strike out the statements as to why this locomotive *move,* or why a locomotive could move, as simply being his conclusion or deduction, his guess as to why the locomotive moved. So much

for the motions, themselves. Now, as to the grounds for the motions: There are four possible statutes involved. There is the California State Workmen's Compensation Act. It is the position of the defendant that under that Act compensation is payable to this man, we are willing to pay it, we offered to pay it, and did pay it to him until he left the hospital against the doctor's orders. On that no question of negligence, or defect, or anything else arises. As your Honor knows, that California Statute is practically an insurance statute. If the employee is injured, it does not make any difference what the reason of the injury was, he is entitled to be paid his compensation under the jurisdiction of the Industrial Accident Commission of the State of California. The only defenses are defenses which, of course, are not involved here, intoxication on the part of the employee, and wilful disregard of safety orders.

The other three statutes which might possibly be involved are Federal statutes, and statutes which apply only to railroad companies. The first of those statutes is the Federal Employers' Liability Act, providing for a recovery by employees who are injured as a result of negligence, where the carrier and the employee at the time of the injury were both engaged in interstate commerce. So the vital things under that [44] statute are interstate commerce and negligence.

The other two statutes are the Boiler Inspection Act and the Safety Appliance Act. The Safety Appliance Act has nothing to do with the throttle. The

Safety Appliance Act deals with brakes, hand-rails, grab-irons, sill steps, and all that sort of thing, as to which there is absolutely no evidence in this case. So the Safety Appliance Act passes out of the picture, because there is no evidence directed to any defect provided for in the Safety Appliance Act—no evidence at all, your Honor, except as to the throttle. The throttle would fall under the Boiler Inspection Act.

The Boiler Inspection Act *in* this, that in the first place, it applies to all locomotives used by interstate carriers, whether at the particular time the locomotive was engaged in interstate commerce or not, provided that the carrier was engaged in interstate commerce. The United States Supreme Court has upheld the constitutionality of that statute upon the ground that where it is impractical to divide intrastate and interstate commerce movements, it is competent for Congress to cover the field.

As to the first alleged cause of action the motion is made upon the ground that there is no showing whatever that the locomotive involved here or the plaintiff were or either of them was engaged in interstate commerce at the time of the accident, within the meaning of the Federal Employer's Liability Act and that consequently the matter is one covered by the California Workmen's Compensation Act which provides the exclusive remedy and the exclusive jurisdiction of which is vested in the California Industrial Accident Commission, and upon the further ground that there is no proof

of any negligence with respect to the operation of the engine or in the particular alleged in the complaint. [45]

As to the second alleged cause of action the motion is made upon the ground that there is no showing whatsoever of any defect in the locomotive or any defect in the throttle of the locomotive.

The COURT.—You insist on pressing your motion, do you, Mr. Dunne?

Mr. DUNNE.—Yes, your Honor.

The COURT.—I always prefer, wherever it is possible, to submit a case of this kind to the jury for its verdict. I can do so, however, only where the plaintiff has shown some evidence to establish each necessary element in the proof of his cause of action. Where the plaintiff has failed to prove some necessary part of this cause of action it is my duty to grant a motion by the defendant for a nonsuit. This is in fact the fairer thing to do when the plaintiff is considered, as he may then, if he desires, appeal from my ruling. If the case goes to the jury, with proof lacking on some essential point, and the jury should find for the plaintiff, I would then be under the duty of granting a new trial. In the Federal courts there is no appeal from an order for a new trial and the plaintiff would have to go through the trouble and expense of an entire new trial before he could test my ruling as to the insufficiency of the evidence to sustain a judgment in his favor. Accordingly, in this case I shall grant defendant's motion for a nonsuit.

The first count of the complaint is based upon the Federal Employer's Liability Act. In order to recover upon this count plaintiff must prove that he was engaged in interstate commerce at the time of his injury. In this case the engine upon which plaintiff was working had been delivered to the roundhouse hostler after the close of a shift in which it had been used in both interstate and intrastate commerce. It was being [46] fueled prior to being run into the roundhouse to await its next assignment. There is no evidence to show that the next assignment would be in interstate commerce; I believe the evidence to be insufficient to show that the task in which plaintiff was engaged at the time he was hurt was so closely connected with interstate work that it was a necessary incident of such work and to be taken as part of interstate work.

The second count of the complaint is based upon an alleged violation of the Federal Boiler Inspection Act, in that defendant used its engine while its throttle, valves and steam chest and other appurtenances were defective. In order to maintain his action under this count, plaintiff need not prove that he was engaged in interstate commerce at the time of his injury to him, and that they were the proximate cause of the injury. After careful review of the evidence introduced by plaintiff, I cannot find that there is evidence of the existence of defects in the engine sufficient to take this case to the jury. In the first place, there is no direct evidence as to the existence of defects in the engine

at the time of the injury. There is only the evidence that it started to move. There is no evidence as to whether at that time the throttle was closed entirely nor as to whether the air-brakes were on or off. It is true that there is evidence that three days before this injury occurred the same engine did start spontaneously, with the throttle closed, but there is no evidence as to the setting of the brakes on that occasion, or as to whether they were on or off, nor is there direct evidence that this prior spontaneous starting was in fact due to a leaking valve. In other words, there is no positive evidence that the prior starting up was due to a defective valve, and even if this might reasonably [47] be inferred as to that occasion, the fact that it does not appear that the throttle was closed at the time of the accident with which we are concerned, makes the evidence as to the prior occurrence valueless for the purpose of proving the cause of the movement at the time of the accident. It is just as possible to infer that an open throttle caused the movement as it is to infer that some defect of the valve did so.

Let an exception be noted.

Mr. McCUE.—If the Court please, may I have thirty days in which to settle and allow a bill of exceptions?

The COURT.—Certainly.

Mr. DUNNE.—We will stipulate to that, your Honor.

The COURT.—Very well.

[Title of Court and Cause.]

STIPULATION.

It is hereby stipulated by and between the parties to the above-entitled action that the foregoing constitutes a true and correct bill of exceptions and the Judge who tried the same is requested to settle and allow the foregoing as the bill of exceptions herein.

THOMAS F. McCUE,
Attorney for Plaintiff.

_____,
Attorneys for Defendant.

[Title of Court and Cause.]

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

I, A. F. St. Sure, one of the Judges of the United States District Court for the Northern District of California, do hereby certify that the foregoing pages of typewritten matter from 1 to 26, inclusive, constitutes a correct bill [48] of exceptions of the case and the same is hereby settled and allowed as the bill of exceptions herein.

It is hereby ordered that the Clerk of this court certify to the Circuit Court of Appeals Defendant's Exhibits "A," "B" and "C" in their original form as a part of the record herein.

Dated: This 23 day of March, 1931.

A. F. ST. SURE,
Judge.

Receipt of copy of the within bill of exceptions is hereby admitted this 20th day of March, 1931.

DUNNE, DUNNE & COOK,
A. B. DUNNE,
Attorneys for Defendant.

[Endorsed]: Filed Mar. 23, 1931. [49]

[Title of Court and Cause.]

PETITION FOR APPEAL.

J. C. Walton, plaintiff in the above-entitled action, feeling himself aggrieved by the decision of the Court sustaining defendant's motion for a nonsuit, and the entering of judgment herein on the 25th day of February, 1931, dismissing plaintiff's cause of action and for costs to defendant, and feeling himself aggrieved for that in and by said decision and judgment and for the errors committed to the prejudice of plaintiff, all of which more in detail appears from the assignment of errors which the plaintiff has filed herein, by reason thereof now comes Thomas F. McCue, plaintiff's attorney and petitions said Court for an order allowing the plaintiff to prosecute this appeal to the Honorable United States Circuit Court of Appeals for the Ninth Circuit under and according *with* the laws of the United States in that behalf made and provided;

and also that an order be made fixing the amount of the cost bond on appeal; and that a transcript of the record, proceedings and papers in this action, duly authenticated, be sent to said Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

THOMAS F. McCUE,
Attorney for Plaintiff and Appellant.

[Endorsed]: Filed Mar. 23, 1931. [50]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

The plaintiff in the above-entitled case says there is manifest error in the record herein committed by the trial court and alleges the following as such:

I.

The Court erred in striking out the answer of plaintiff in response to the following question, to wit:

> Mr. McCUE.—Mr. Walton, did you know what the duties of the hostler in the Colton yard were during the period covered by this matter? A. Yes.
>
> Q. You may state what they were.
>
> Mr. DUNNE.—I make the objection that it calls for the conclusion of the witness and it is without foundation, this man is not a hostler, no foundation is shown.
>
> The COURT.—I will overrule the objection. Exception.

A. The hostler's duty was to have that engine in charge at all times, have it under his control at all times, sit in the engineer's seat, where he had access to the throttle, the air, and all the manipulations which run in stopping an engine while I was doing my work on the engine, until I got through.

Mr. DUNNE.—I move to strike that out, your Honor, [51] it is simply an argument from the witness.

The COURT.—The motion is granted; exception noted.

II.

The Court erred in granting and sustaining the defendant's motion for a nonsuit.

III.

The Court erred in entering judgment dismissing plaintiff's complaint and awarding costs to the defendant.

THOMAS F. McCUE,
Attorney for Plaintiff.

Due service and receipt of copy of the foregoing assignment of errors is admitted this 20th day of March, 1931.

DUNNE, DUNNE & COOK,
A. B. DUNNE,
Attorneys for Defendant.

[Endorsed]: Filed Mar. 23, 1931. [52]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon motion of Thomas F. McCue, attorney for the above-named plaintiff and appellant, and a petition for appeal having been filed herein,—

IT IS ORDERED that an appeal be and the same is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the ruling sustaining defendant's motion for nonsuit and the entering of the judgment herein on the 25th day of February, 1931, in favor of the defendant and against plaintiff, J. C. Walton, as by law provided.

IT IS FURTHER ORDERED that the cost bond on appeal herein be and the same is hereby fixed in the sum of two hundred and fifty ($250.00) dollars.

Dated: 23d March, 1931.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Mar. 23, 1931. [53]

Premium charged for this bond is $10.00 for the term thereof.

[Title of Court and Cause.]

COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, J. C. Walton, as principal, and the United

States Fidelity and Guaranty Company, a corporation, of Baltimore, Md., as surety, are held and firmly bound unto the Southern Pacific Company, a corporation, its successors and assigns, in the sum of Two Hundred and Fifty ($250.00) Dollars, to be well and truly paid, for which payment we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of March, 1931.

The condition of the above obligation is such that, whereas said J. C. Walton, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from that judgment entered in the District Court of the United States for the Northern District of California, Southern Division, dismissing plaintiff's cause of action and granting costs to the defendant in a suit pending, wherein said J. C. Walton, is plaintiff and the Southern Pacific Company, is defendant, which judgment was entered in said court on the 25th day of February, 1931.

NOW, THEREFORE, if the appellant will prosecute said appeal and answer and pay all costs incurred on said appeal if he fails to make his plea good, then this obligation to be void; otherwise to remain in full force and effect.

This recognizance shall be deemed and construed to contain an "Express Agreement" for Summary

Judgment, and Execution [54] thereon, mentioned in Rule 34 of the District Court.

J. C. WALTON,
Principal.

UNITED STATES FIDELITY AND GUARANTY COMPANY.
By EARNEST W. COPELAND, (Seal)
Its Attorney-in-fact.

Form of bond and sufficiency of sureties approved March ——, 1931.

_____,
United States District Judge.

The foregoing bond is approved as to form and sufficiency.

March 23, 1931.

A. F. ST. SURE,
Judge.

State of California,
City and County of San Francisco,—ss.

On this 20th day of March, in the year one thousand nine hundred and thirty-one, before me, Amy B. Townsend, a notary public in and for the city and county of San Francisco, personally appeared Ernest W. Copeland, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that he subscribed the name of the United States

Fidelity and Guaranty Company thereto as principal and his own name as attorney-in-fact.

[Seal] AMY B. TOWNSEND,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires October 29, 1934.

[Endorsed]: Filed Mar. 23, 1931. [55]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To Walter B. Maling, Clerk of the Above-entitled Court:

You will please prepare a transcript on appeal, including the following portion of the record, to wit:

1. Complaint.
2. Answer.
3. The final judgment.
4. The bill of exceptions.
5. Petition for appeal.
6. Assignment of errors.
7. Order allowing appeal.
8. Cost bond on appeal.
9. Citation on appeal.
10. This praecipe.

THOMAS F. McCUE,

Attorney for Plaintiff and Appellant.

Due service and receipt of a copy of the within praecipe is hereby admitted this 20th day of March, 1931.

DUNNE, DUNNE & COOK,
A. B. DUNNE,
Attorneys for Defendant.

[Endorsed]: Filed Mar. 23, 1931. [56]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 56 pages, numbered from 1 to 56, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $9.60; that the said amount was paid by the plaintiff and appellant, and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 24th day of March, A. D. 1931.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [57]

[Title of Court and Cause.]

CITATION ON APPEAL.

To the Southern Pacific Company, a Corporation:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City and County of San Francisco, State of California, within thirty days from the date of this citation, pursuant to an appeal filed in the Clerk's office of the Southern Division of the United States District Court for the Northern District of California, whereof the plaintiff, J. C. Walton, is appellant and you are respondent, to show cause, if any there be, why the judgment appealed from should not be reversed and corrected and speedy justice should be done to the parties in that behalf.

WITNESS, the Honorable A. F. St. SURE, United States District Judge for the Northern District of California, this 23d day of March, 1930.

A. F. St. SURE,
United States District Judge.

Due service and receipt of a copy of the within citation is hereby admitted this 23d day of March, 1931.

DUNNE, DUNNE & COOK,
A. B. DUNNE,
Attorneys for Respondent. [58]

Receipt of copy of the within citation on appeal is hereby admitted this 23d day of March, 1931.

DUNNE, DUNNE & COOK,
A. B. DUNNE,
Attorneys for Defendant.

[Endorsed]: Filed Mar. 24, 1931.

[Endorsed]: No. 6421. United States Circuit Court of Appeals for the Ninth Circuit. J. C. Walton, Appellant, vs. Southern Pacific Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 24, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.